IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 363.

FELIX T. BOYLAN, et al.,
Petitioners,

vs.

LOUIS DETRIO, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court of the United States for the Southern District of Mississippi and the findings of fact and conclusions of law are found in the Record at

Pages 2225-40. The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in 169 F. 2d 77.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on the 23rd day of July, 1948. Thereafter, a petition for rehearing was timely filed and was denied on September 16, 1948. Thereafter, a motion was filed to stay the Mandate so as to permit a petition for writ of certiorari to be filed, and on the *25th* day of *Sept., 1948*, an order was entered granting this stay. Thereupon, the respondents filed a motion asking the court to amend the order staying the Mandate so as to require the petitioners to give supersedeas security, as provided by Rule 38, Section 6, and Rule 36 of the United States Supreme Court Rules. This motion was overruled. The jurisdiction of this Court is invoked by the petitioners under 28 U. S. Code, Section 1254 (1).

QUESTIONS PRESENTED

The petitioners, in their petition and brief, present five questions, as follows:

"(1) Can a limited partnership, formed and existing under the laws of the State of New York, admit a general partner by oral agreement, when the express provisions of Sec. 98 (1) (e) of the New York Partnership Law specifically provide that no general partner can be admitted without the written consent or ratification of all the limited partners?

"(2) Can such limited partnership be orally amended so as to admit a general partner, when the original written articles of partnership specifically provide that any amendments or alterations thereto must be in writing under the joint hands of all parties?

"(3) Under the provisions of the New York Partnership Law, does an assignment by a partner of a portion of his partnership interest to a stranger, make the assignee a partner of the partnership?

"(4) Can a person become a general partner and participate in the profits when he does not make his required capital contribution, as specifically agreed to by him?

"(5) Has there been an abuse of discretion by the Court of Appeals, when in its judgment it awarded total costs against your Petitioners in solido?"

Whether or not these questions are real issues will be discussed under our argument in this brief, but respondents do take the position that there are no questions whatever presented, in which the United States Circuit Court of Appeals for the Fifth Circuit has reached its decision, in conflict with the applicable law of the State of New York, but on the contrary, that the decision of the Fifth Circuit is in entire harmony with the laws of the State of New York; that no other substantial question is presented.

STATEMENT

In stating the controlling facts in this case, we cannot

do better than to cite the footnotes to the opinion of the Circuit Court of Appeals, 169 F. 2d 77, and continuing on each page to the foot of page 81. These footnotes condense in concise and pertinent form the undisputed facts as found by the Circuit Court of Appeals.

The appellants in the court below, respondents here, based and bedrocked their appeal upon the admitted testimony of the two defendants in the court below so that there was not presented to the Circuit Court of Appeals any question of determination to be based upon a finding of conflict of fact, but on the contrary, the question was presented that the trial court had erred in failing to find for the appellants upon the admitted facts of the defendants in the District Court. No where is this better shown than in the opinion of the Circuit Court of Appeals at page 81 of the citation, supra, wherein the court stated as follows:

"In the face, then, of Boylan's testimony: 'His brothers and Mr. Glasscheib agreed to an amended agreement where he would come back into the company as of March 1st' (Rec. 699), and of that at Record p. 710: (Q) 'About March 1st, it was agreed among you that Mr. Louis Detrio was to come back into the partnership as a full partner with a 36⅔ interest?' (A) 'That's right,' and of the undisputed facts of record that Detrio returned to his partnership drawing status of $2500 per month and his active management as a general partner, it will not do to claim, as appellees do, and the court finds, that for want of a writing this agreement of partnership was incomplete and ineffective."

ARGUMENT

We shall answer the arguments in the order presented by petitioners, but we first wish to point out that we have examined very carefully the cases cited on pages 8 and 9 of petitioners' brief and are unable to find anything in their holding which would justify the granting of a writ in the instant case.

Point I.

Under this heading the petitioners argue that the learned Circuit Court of Appeals for the Fifth Circuit erroneously determined important questions arising under the statutory laws of New York governing limited partnerships.

These statutes of the State of New York have no application unless the partners themselves comply with them by executing partnership articles and filing them for recordation as by the statutes provided; and this being omitted of observance by the partners, those who sought to gain protection as limited partners simply are classed as general partners as to all who deal with the partnership. There is no requirement of the laws of New York that the formation of a partnership must be exclusively manifested by executed written articles of partnership; nor do the laws of New York inhibit as between the partners an oral amendment of written partnership articles. A complete answer to the appellees' contention in this respect is presented by the admitted fact that the articles of partnership into which the respondent Louis Detrio entered by oral agreement of all the partners in February, 1945 was not

manifested by written articles signed by all the partners until after he had entered it, and was not recorded under the laws of New York until July 31, 1945, long after he had re-entered the partnership, (Rec. *36-39*); as said the Circuit Court of Appeals for the Fifth Circuit in its opinion in the cause, 169 F. 2d, pages 80 and 81:

"It (the dealings between the partners) is also a story of formal informality, informal formality, of things agreed to in substance orally and thereafter acted on as agreed, and later, only as matter of form, reduced to writing."

In other words, the statutes of New York governing limited partnerships, invoked so vehemently by the respondents, have no applicability to the questions here presented because at the time the oral agreement was formed, the articles of partnership expressing the agreement of partnership into which the respondents entered had not been executed, and were not recorded, although the partnership as a purported unlimited one, was operating with full actual effect.

The New York authority principally relied upon by the respondents in support of their argument to the contrary is *Smith v. Maine, 145 Misc. 521, 260 N. Y. S. 425;* and this authority expressly holds that the laws of New York do not inhibit or invalidate the oral formation of a partnership. In that regard, the authority militates diametrically upon the position of the respondents.

Point II.

In answering Point II, we again refer to the opinion

of the Circuit Court of Appeals which reveals in the footnotes to the opinion precisely the same proposition that the appellants presented in asking the court to reverse the District Court; namely, that the testimony of the defendants alone completely and unequivocably supported the appellants' contentions and caused the court to find in favor of them on appeal. Of course, the rights were vital rights, but the testimony upon which the Circuit Court of Appeals based its decision was not upon controverted testimony, but on the contrary upon the undisputed testimony which was given by the defendants Boylan and Glasscheib.

Point III.

There is no merit in petitioners' contention that the court abused its discretion when it awarded total costs against the petitioners in solido. No where in the opinion of the court or judgment is there any support for the petitioners' statement that the Circuit Court of Appeals sustained the District Court on its findings on the issues of fraud, conspiracy, conversion, and misappropriation; that on the contrary, the opinion is entirely silent upon these issues, presumably because these matters would be properly inquired into under the directions of the Circuit Court of Appeals on the remand. All that the court of Appeals sustained the District Court on was that Marks never did become a partner or have any right under the written contract.

Therefore, the costs were properly taxable and is not a matter of proper review before this tribunal. The record which was presented in the court below was necessary for a proper determination of all the issues between the par-

ties, and there was no effort made by the appellees below, petitioners here, to diminish the record any more than the agreement which was executed by both parties and which is found in Record Volume I, page 1.

We cannot agree that petitioners were powerless to insist upon an abbreviated record. On the contrary, they had the right to so insist if they had chosen and could have made proper showing, but instead, they chose to sit silently by and to raise it for the first time in this petition. The Circuit Court of Appeals did not abuse its discretion in anywise.

CONCLUSION

As stated previously, we have examined carefully all of the authorities cited by the petitioners and can no where find anything to sustain their position in requesting a writ of certiorari. As previously stated, the leading New York case of *Smith v. Maine (1932), 145 Misc. 521, 260 N. Y. S. 409*, not only does not sustain petitioners but on the contrary shows quite clearly that the opinion of the Fifth Circuit in this case does not conflict with *Smith v. Maine* but is in harmony with it. In this case, the New York court reviewed at length quite a number of New York cases, all of which sustained the respondents' position here rather than the petitioners. In addition, the following New York cases are also against petitioners and fully sustain respondents' position:

Pierce v. Feno, et al., 184 N.Y.S. 851;

Martin v. Peyton, 246 N. Y. 213, 158 N E. 77;

Weinstein v. Weldon, 80 Misc. Rep. 348, 142 N. Y. S. 406;

Casola v. Kugelman, 33 App. Div. 428, 54 N. Y. S. 89, affirmed by memorandum, 164 N. Y. 608, 58 N. E. 1085;
Kearney v. Korris, 18 N. Y. S. 346;

In re Rosenberg's Will, 251 N. Y. 115, 167 N. E. 190;

47 Corpus Juris, Sec. 233, page 782;
Rubin v. Whitney, 162 Misc. 821, 295 N. Y. S. 255.

For the reasons set forth above, the petition for certiorari herein should be denied.

Respectfully submitted,

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